No. SC 84336

IN THE SUPREME COURT OF MISSOURI

MISSOURI SOYBEAN ASSOCIATION, MISSOURI AG INDUSTRIES COUNCIL, INC., ASSOCIATED INDUSTRIES OF MISSOURI, and MISSOURI CHAMBER OF COMMERCE,

Appellants,

vs.

THE MISSOURI CLEAN WATER COMMISSION, TOM HERMAN in his capacity as Chairman of the Missouri Clean Water Commission, THE DEPARTMENT OF NATURAL RESOURCES FOR THE STATE OF MISSOURI, and STEPHEN M. MAHFOOD in his capacity as Director of the Missouri Department of Natural Resources,

Respondents.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY NO. CV198-1432CC – HONORABLE THOMAS J. BROWN III

SUBSTITUTE BRIEF FOR APPELLANTS

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Dated: May 30, 2002

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JURISDICTIONAL STATEMENT

This action was filed by Appellants Missouri Soybean Association, Missouri Ag Industries Council, Inc., Associated Industries of Missouri and the Missouri Chamber of Commerce (collectively, "Appellants"). Appellants seek a declaration of the invalidity of actions taken by Respondents The Missouri Clean Water Commission ("MCWC"), Tom Herman in his capacity as Chairman of the MCWC, The Missouri Department of Natural Resources ("MDNR"), and Stephen M. Mahfood in his capacity as Director of MDNR (collectively, "Respondents"), and an injunction restraining Respondents from enforcing or implementing the challenged actions. Appellants claim that Respondents' actions violate the Missouri Clean Water Law, § 644.006, *et. seq.*, and the Missouri Administrative Procedure Act, § 536.010, *et seq.* ("the MAPA").

On January 4, 2001, the Honorable Thomas B. Brown, Circuit Judge for the 19th Judicial Circuit, dismissed Appellants' claims based on an asserted lack of subject matter jurisdiction. The Circuit Court held that Respondents did not "render a final decision subject to judicial review," because, according to the Court, the United States Environmental Protection Agency was actually the "final arbiter" of the actions taken by Respondents. (A copy of the Circuit Court's memorandum appears in the Legal File ("L.F.") at 462, and is reproduced in the Appendix to this Brief at A-027 to A-028.)

Appellants timely appealed to the Missouri Court of Appeals, Western District. On January 15, 2002, the Court of Appeals issued its opinion affirming the dismissal of Appellants' claims, but on a different ground than the Circuit Court. Although it had not been briefed or argued by either party, the Court of Appeals held that Respondents' challenged action was an "intergovernmental *

* * communication which does not substantially affect the rights of, or procedures available to, the public or any segment thereof" within the meaning of § 536.010(4)(c), R.S. Mo., and was therefore not a "rule" subject to review under the MAPA. Although the Clean Water Law, § 644.071 R.S. Mo., provides for review of all of the MCWC's "final orders or determinations," the Court of Appeals essentially equated this phrase with the MAPA's definition of a "rule", and held that any tension between the different wording of the MAPA and the Clean Water Law was "a dilemma that must be resolved, if at all, by the legislature." (A copy of the Court of Appeals' opinion is reproduced in the Appendix at A-001 to A-028.)

Appellants timely moved for rehearing, or in the alternative for transfer, on January 30, 2002. The Court of Appeals denied all relief on March 5, 2002. Appellants then applied to this Court for transfer, which was granted on April 23, 2002.

STATEMENT OF FACTS

In this action, Appellants allege that Respondents failed to comply with the MAPA's notice, comment and fiscal note procedures, and with the Missouri Clean Water Law, when they adopted Missouri's 1998 list of waters "impaired" by a "pollutant" within the meaning of § 303(d) of the federal Clean Water Act, 33 U.S.C. § 1313(d) (the "303(d) list"). L.F. 003-019. In particular, Appellants contend that Respondents failed to adhere to the MAPA and the Clean Water Law when they added the entire lengths of the Missouri and Mississippi Rivers to Missouri's 1998 303(d) list, based on purported impairment by a "pollutant" denominated "habitat loss," without either filing a fiscal note, or seeking public notice on the proposed listing of these rivers. In addition, Appellants claim that Respondents' rulemaking actions were arbitrary and capricious, because

Respondents did not have any evidence to support inclusion of the Missouri and Mississippi Rivers on Missouri's 303(d) list, because "habitat loss" is not a pollutant which can justify § 303(d) listing, and because the listing of these rivers is directly contrary to MDNR's expert, technical finding that "there are no water quality contaminant violations" on these rivers.

1. Statutory Framework of the Federal Clean Water Act

The Federal Clean Water Act takes two primary approaches to improve the environmental quality of waterbodies, both of which delegate significant responsibility to the States. *First*, the statute requires that States implement a system to regulate the discharges to waterbodies from individual discrete, identifiable sources ("point sources") through standards which are based on the use of specified control technologies. *See generally* 33 U.S.C. § 1311. The statute presently requires point sources to employ "the best available [effluent control] technology economically available." 33 U.S.C. § 1311(b)(2).

In addition to requiring point sources to employ effluent controls, the Act also applies a second water pollution control strategy, based on the environmental condition of the waterbodies themselves. States are charged with proposing and adopting water quality standards ("§ 303(c) standards") and submitting them to the Environmental Protection Agency ("EPA") for approval. *See* 33 U.S.C. § 1313(c) L.F. 047. These water quality standards establish acceptable ambient levels of pollutants in particular waterbodies, based on the designated uses of the waterbody (*e.g.*, drinking water source, contact vs. non-contact recreational uses, etc.). 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. pt. 131. It is undisputed that in promulgating the § 303(c) standards, Respondents comply with all of the MAPA's rulemaking requirements. L.F. 065, 110-39. (The

text of § 303 of the federal Clean Water Act, 33 U.S.C. § 1313, is reproduced in the Appendix to this Brief at A-030 to A-037.)

After the EPA approves the § 303(c) standards, the State is required to adopt and submit a list of all bodies of water contained within its boundaries which do not comply with the state's § 303(c) standards "after the application of all conventionally required technology," *i.e.*, after application of required controls on point sources. *See* 33 U.S.C. § 1313(d)(1)(A), L.F. 048. The Act mandates that this list of non-compliant (or "impaired") waters, otherwise known as a § 303(d) list, be compiled and submitted to the EPA for approval in every even-numbered year. L.F. 049. The list does not include waters which can meet the § 303(c) standards after compliance with technology standards set out in individual permits.

In formulating their 303(d) lists, EPA's regulations require the State "to assemble and evaluate all existing and readily available water quality-related data and information." 40 C.F.R. §§ 130.7(b)(5), 103.22. EPA's regulations also require the State to "provide documentation * * * to support the State's determination to list or not to list its waters * * * includ[ing] at a minimum * * * a description of the data and information used to identify waters * * *." 40 C.F.R. § 130.7(b)(6).

EPA's regulations also specify additional, formal procedures with which the State must comply in formulating its 303(d) list. Thus, the State must give the public a 60-day comment period concerning the State's explanation of "how [it] will consider and evaluate all existing and readily available water quality-related data and information," and must submit to EPA a summary of the comments received, and the State's "responses to significant comments." 40 C.F.R. § 130.23(a).

With respect the State's decision to list specific waters, EPA's regulations provide that the State "must provide public notice and allow the public no less than 30 days to review and comment on [the State's] list of impaired waterbodies." 40 C.F.R. § 130.36(a). Once again, the State must submit to EPA a summary of comments received, as well as the State's "response to all significant comments, indicating how the comments were considered in [the State's] final decision." *Id*. § 130.36(b).

The regulations specify that EPA may approve the listing of a water "only if it meets the requirements of § 130.7(b)." 40 C.F.R. § 130.7(d)(2). As one federal district court has recognized, the requirements of 40 C.F.R. § 130.7 "cannot be read as anything other than mandatory." *American Canoe Ass'n v. USEPA*, 30 F. Supp.2d 908, 918 (E.D. Va. 1998).

EPA's regulations provide that the State "may remove a listed waterbody for a particular pollutant if new data or information indicate that the waterbody is attaining and maintaining the applicable water quality standards for that pollutant." 40 C.F.R. § 130.29(c). Pointedly, this rarely-invoked provision does not permit Respondents to de-list a water on the grounds that the original listing decision was erroneous.

After the EPA approves a state's 303(d) list, the Clean Water Act requires each state to conduct assessments and then formulate Total Maximum Daily Loads ("TMDLs") for *each* water contained on its 303(d) list. *See* 33 U.S.C. § 1313(d)(1)(C). L.F. 048. TMDLs are used to calculate "the amount of contaminant that a water body can readily assimilate without violating [the § 303(c) water quality] standards." *Id*. In other words, a TMDL establishes the maximum amount

of a pollutant which can be introduced to a waterbody, from any source, per day, such that the waterbody will nevertheless attain the applicable water quality standard.

TMDLs will, by definition, require further, additional restrictions on discharges beyond those otherwise required under the Clean Water Act or state law – the whole point of TMDLs is that *existing* limitations are purportedly inadequate to meet applicable water quality standards. EPA and the respective States utilize the TMDLs to impose further restrictions on businesses and individuals who are either existing or potential sources of pollutants to listed waters. L.F. 048. Such restrictions ordinarily include modification of the technology-based discharge permits for businesses, and/or implementation of land-management practices for non-point sources of pollution (e.g., agriculture). L.F. 048-049.

The 303(d) list is, by statute, limited to waters which are impaired by a "pollutant". *See also* 40 C.F.R. § 130.7(b)(4) (303(d) lists "shall identify the pollutants causing or expected to cause violations of the applicable water quality standards"). The Clean Water Act defines a "pollutant" as a variety of substances, as well as heat, which are "discharged into water." 33 U.S.C. § 1362(6). EPA has itself recognized, in the preamble to its final TMDL rule, that *physical alterations* to a waterbody (*i.e.*, changes to a waterbody's profile, or flow), do not constitute impairment by a "pollutant".[1] EPA's discussion begins by explaining the difference between the broad term "pollution", and the narrower term "pollutant" used in § 303(d):

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[1] EPA has delayed the rule's effectiveness to permit the agency "voluntarily to reconsider" it, due to the "considerable controversy" it engendered. 66 Fed. Reg. 53,044 col. 3 (Oct. 18, 2001).

> Pollution, as defined by the CWA and the current regulations is "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of a waterbody." This is a broad term that encompasses many types of changes to a waterbody, including alterations to the character of a waterbody that do not result from the introduction of a specific pollutant * * *. In some cases, the pollution is caused by the presence of a pollutant, and a TMDL is required. In other cases it is caused by activities other than the introduction of a pollutant.

65 Fed. Reg. 43,586, 43,592 col. 1 (July 13, 2000). EPA then specifically states that "degraded aquatic habitat" is not an "impairment" caused by a "pollutant":

> Degraded aquatic habitat is evidence of impairment which may be caused solely by channelization of a stream's bottom. *In this case the waterbody would be considered impaired by pollution that is not the result of the introduction or presence of a pollutant*.

Id. (emphasis added).[2]

Similarly, EPA's National Guidance document concerning the 303(d) listing process recognizes that other impairments which affect the physical profile of a water body do not constitute impairment by a "pollutant":

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[2] This passage continues by stating that habitat degradation may be the result of impairment by a "pollutant" "if the channelization also caused the bottom to become smothered by excessive sediment deposition," 65 Fed. Reg. at 43592 col. 1. However, in that case, the excessive deposit of "sediment" (itself a "pollutant") would have to be shown.

> In the specific case of a physical barrier to fish migration such as a culvert, [ ] there is no pollutant to allocate and the TMDL process is not appropriate.

AR 1323.

2. Missouri's Statutory Framework

Missouri statutes declare the State's intention to perform the duties delegable to it under the federal Clean Water Act, and specify the manner in which Respondents must perform those federally-mandated responsibilities.

The Missouri Clean Water Law (§ 644.006 R.S. Mo. *et seq.*) requires Respondents to regulate Missouri's waters and streams consistent with the following public policy:

> * * * whereas this state must possess the authority required of states in the Federal Water Pollution Control Act as amended if it is to retain control of its water pollution programs, it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain and improve the quality thereof * * * to provide for the prevention, abatement and control of new and existing water pollution; and to cooperate with other agencies of the state * * * the federal government and any other persons in carrying out these objectives.

§ 644.011 R.S. Mo.

The Missouri Clean Water Law specifies that Respondents must act by rule, after public hearing, in discharging their obligations under federal environmental statutes:

> (7) *After holding public hearings, identify waters of the state* and prescribe water quality standards for them, giving due recognition to

variations, if any, and the characteristics of different waters of the state which may be deemed by the commission to be relevant insofar as possible *under any federal water pollution control act*. These shall be reevaluated and modified as required by any federal water pollution control act;

(8) *Adopt, amend, promulgate or repeal after due notice and hearing, rules and regulations to enforce, implement and effectuate the powers and duties* of sections 644.006 to 644.141 and any *required of this state by any federal water pollution control act*, as the commission may deem necessary to prevent, control and abate existing or potential pollution. * * *

§ 644.026 R.S. Mo. (emphasis added).

3. Respondents' Actions in Proposing and Adopting Missouri's 1998 303(d) List

Respondents have responsibility under the Missouri Clean Water Law for adopting Missouri's water quality standards and 303(d) list of impaired waters. L.F. 049. Respondent MDNR reviews the available data, and prepared a recommended list of impaired Missouri waters for Respondent MCWC. L.F. 049. Respondent MCWC, Missouri's "water contaminant control agency," is ultimately responsible for approving and submitting Missouri's final 303(d) list to the EPA by April 1 of each even-numbered year. L.F. 049. This lawsuit was initiated in response to the Respondents' actions in compiling and approving Missouri's 1998 303(d) list. L.F. 003.

Respondents' actions leading up to their September 23, 1998 adoption of Missouri's 1998 303(d) list are summarized in the following chronology from the administrative record:

- **January 23, 1998** – MDNR issued its first notice of Missouri's 1998 recommended § 303(d) list entitled "PUBLIC NOTICE OF SECTION 303(d) WATERS." This proposed list contained seventy-two bodies of water which had been determined to be "impaired". L.F. 177. Attached to the Public Notice was a section designated "Notes regarding other potential waters." L.F. 180-182. The Missouri and Mississippi Rivers were not mentioned anywhere within the January 23, 1998 Public Notice.
- **March 20, 1998** – MDNR published a list of "waters which were submitted by public comment for addition to the 1998 proposed list of waters designated under Section 303(d) * * *," in response to MDNR's January 23 public notice. L.F. 184. Although at least one commenter had suggested the listing of each water identified in the March 20 public notice, MDNR explicitly stated that it was not itself recommending those waters for 303(d) listing:

> Please note that these streams are not proposed for addition to the list by the Water Pollution Control Program. Following this notice period, the program will review comments received from this notice, evaluate available stream data, and recommend a final list to the MCWC.

L.F. 184. The Missouri and Mississippi Rivers were identified in the March 20 notice, based on the supposed presence of "All Pollutants," in these waters, with an "unspecified" source. L.F. 185.

- **May, 1998** – MDNR published a list of waters entitled "RECOMMENDED SECTION 303(d) WATERS". L.F. 187. In the document, MDNR noted that MCWC "seeks comments regarding the following waters which are recommended by the Department as the 1998 list of waters to designated [sic] under Section 303(d) of the federal Clean Water Act." L.F. 187. The recommended list contained eighty-five bodies of water recommended for inclusion on the 303(d) list. L.F. 187-190. The Missouri and Mississippi Rivers were not included on the recommended list**.** L.F. 187-190.

- **August 14, 1998** – MDNR issued a third list entitled "NOTICE OF AVAILABILITY FOR COMMENT ... RECOMMENDED SECTION 303(d) WATERS". L.F. 192. In the August 14 notice, MDNR explicitly stated its view, based on its technical assessment of available data, that 303(d) listing was *not* warranted for the Missouri and Mississippi Rivers

  The Missouri and Mississippi Rivers are not listed because there are no water quality contaminant violations. The department recognizes that these two great rivers have diminished resource quality due to significant flow depletions and habitat alterations. The department further recognizes that the Mississippi and Missouri Rivers are national interest waters that must be protected against further flow depletions and habitat losses. The department looks to the U.S. Congress to build upon existing efforts for the restoration of these great river resources.

  L.F. 192-193 (emphasis added).

- **September 23, 1998** – During an MCWC public meeting, MDNR presented its August 14, 1998 proposed list and recommended that MCWC adopt the list. L.F. 083. During that meeting, MDNR's representative once again affirmed to MCWC that the Missouri and Mississippi Rivers were not being recommended for inclusion on Missouri's 1998 303(d) list. L.F. 083.

Notwithstanding MDNR's significant investigation, factual determinations and recommendations, and without advance notice, during its September 23, 1998 meeting, MCWC (on a floor motion made by a member of the commission) added the entire lengths of the Missouri and Mississippi Rivers to Missouri's 1998 303(d) list. L.F. 083-084. There was little or no discussion regarding the significant ramifications of this action to individual citizens and businesses in Missouri, or the fact that it was being taken against the specific recommendations of MDNR. L.F. 084. Moreover, there was no discussion of which particular segments of these two major rivers should be included on the list nor was there discussion of which pollutant, if any, had caused the Missouri and Mississippi Rivers to become "impaired" under Missouri's § 303(c) water quality standards. L.F. 084. Finally, Respondents failed to place any evidence in the administrative record which supported the inclusion of the Missouri and Mississippi Rivers on Missouri's 303(d) list of impaired waters. In fact, as noted above, the *only* official recommendation by MDNR in the administrative record was that neither the Missouri nor Mississippi Rivers be listed.

Although it decided at its September 23, 1998 meeting to list the entire Missouri and Mississippi Rivers, the MCWC failed to identify any pollutant or pollutants supposedly causing this impairment – that task fell to MDNR. Accordingly, following the September 1998 meeting,

MDNR prepared a list called "SECTION 303(d) WATERS – STATE OF MISSOURI" which "added * * * the Mississippi and Missouri Rivers" for a pollutant designated as "habitat loss," whose source was identified as "channelization". L.F. 200, 204. This was the first reference in the administrative record to Respondents' position that "habitat loss" caused by "channelization" constituted a "pollutant" justifying the 303(d) listing of the Missouri and Mississippi Rivers.

Although the MCWC's final 303(d) list reported that the Missouri and Mississippi Rivers were impaired by "habitat loss," L.F. 204, Respondents acknowledged below that "habitat loss" is not a "pollutant *per se*" and that EPA has never identified it as a pollutant under the Clean Water Act. L.F. 224. In addition, one of MDNR's representatives stated that he was not aware of *any* TMDL which had been previously generated *anywhere in the United States* for "habitat loss." L.F. 238. When asked to estimate the impact of a "habitat loss" TMDL for the Missouri and Mississippi Rivers, Respondent MDNR's official stated:

> * * * we don't know really. There hasn't been sufficient guidance to know what form a TMDL might take on those rivers. It would be hard to answer that question at that time.

L.F. 238.

The final 1998 303(d) list marked the first time the Missouri and Mississippi Rivers had been included on any proposed or actual Missouri 303(d) list; to Appellants' knowledge, this list was the first time *any State in the Nation* had listed these rivers in their entirety under § 303(d). It is uncontroverted that Respondents took this dramatic action without ever:

(1) publishing notice of their intent to do so in the Missouri Register;

(2) providing an opportunity for public comment on the MCWC's proposed listing of the Missouri and Mississippi Rivers;

(3) filing fiscal notes concerning the private and public economic impact of listing and subsequently developing TMDLs on these massive waterbodies; or

(4) providing any evidence, information and/or administrative record demonstrating that those two bodies of water were unable to meet Missouri's § 303(c) water quality standards.

EPA approved Missouri's 303(d) list in January 1999. L.F. 393. However, in connection with that approval process, EPA refused to consider comments on the 303(d) listing of the Missouri and Mississippi Rivers, claiming that its notice and solicitation of public comments was limited to *additional* waters EPA had placed on the Missouri 303(d) list, not to waters previously listed by the State. *Id*. EPA suggested that Respondents may have listed the Missouri and Mississippi Rivers voluntarily, even though those waters did not meet the federal criteria for listing: "the State has the discretion under Section 303(d) * * * to include waters on their Section 303(d) lists that may not be required to be included by current EPA regulations, and EPA's regulations do not compel the Agency to disapprove the State's list because of the inclusion of such waters." L.F. 394.

4. Financial Impact of 303(d) Listing

Missouri's final 1998 303(d) list contained 165 waters. L.F. 200-204. As explained above, the Clean Water Act requires that a TMDL be developed for each waterbody contained on the 303(d) list. *See* 33 U.S.C. § 1313(d)(i)(C) L.F. 048. During the development of the 1998 303(d) list, MDNR estimated that the agency needed to hire 29 or 30 additional people to perform TMDL development for the waters included on the draft 1998 303(d) list, *which at that time did not include the Missouri and Mississippi Rivers*. L.F. 105.

Respondent MDNR submitted a budget for the 2000 fiscal year which requested 32.5 employees and a financial allocation of $3,162,700 to implement the 303(d) list and corresponding TMDLs. L.F. 247. MDNR has estimated that it takes approximately one state employee working an entire year to generate a single TMDL for one body of water. L.F. 100. MDNR also has

acknowledged that generation of each TMDL would cost anywhere from "$10,000 to about $1 million." L.F. 100.

Respondents never estimated the financial impact on private parties of including the Missouri and Mississippi Rivers on the 303(d) list. L.F. 085. Respondents also published nothing in the Missouri Register prior to promulgating Missouri's 1998 303(d) list.

5. Proceedings Below

After Respondents approved Missouri's 1998 303(d) list, Appellants filed suit in the Circuit Court of Cole County, challenging Respondents' promulgation of that list under Missouri state law. In Count I of their Second Amended Petition for Declaratory Judgment and Injunctive Relief, filed December 30, 1998, Appellants argued that Missouri's 1998 303(d) list was a rulemaking under the MAPA, L.F. 008, but that Respondents had adopted the rule without the proper notice and opportunity to comment required by § 536.021, R.S. Mo., L.F. 012. In particular, Appellants argued that that Respondents had:

a. failed to file a notice of proposed rulemaking or an order of final rulemaking concerning the 303(d) list;

b. failed to publish a notice of proposed rulemaking or final rulemaking in the Missouri Register;

c. failed to include the required information in a notice of proposed rulemaking or order of final rulemaking as required by § 536.021(2) and (6);

d. failed to include notice that the Missouri and Mississippi Rivers would be included in the proposed 303(d) list for decision at the September 23, 1998 meeting; and

e. failed to submit their proposed 303(d) list as a "proposed rule to the joint committee on administrative rules as required by Section 536.024 R.S.Mo."

L.F. 012. In Count II of their Second Amended Petition, Appellants alleged that Respondents failed to comply with the MAPA because they never filed a fiscal note with either their proposed or final 303(d) list. L.F. 013-015.

In Count III, Appellants charged that Respondents' actions in approving Missouri's 1998 303(d) list and adding the Missouri and Mississippi Rivers were arbitrary and capricious under the MAPA, since Respondents had "adopt[ed] a list of Section 303(d) waters based on factors other than those allowed in Section 303(d)," and "by purporting to designate Section 303(d) waters where there is no evidence of any water quality contaminant violations." L.F. 016-017. Finally, in Count IV, Appellants complained that Respondents' failure to provide adequate notice of the September 23, 1998 meeting was a violation of Missouri's Sunshine Law. L.F. 017.

On July 18, 2000, Respondents moved to dismiss the action based on a lack of subject matter jurisdiction, arguing that "under Missouri law, a suit against a state agency where the final decision rests with a federal agency should be dismissed for lack of subject matter jurisdiction." *See* L.F. 399-415.

On January 4, 2001, the trial court essentially adopted Respondents' arguments, and dismissed Appellants' action with prejudice "for lack of subject matter jurisdiction." L.F. 462. The trial court held:

> While the [MCWC] makes recommendations to EPA with respect to impaired waters, EPA is the final arbiter of whether a particular water body is impaired. Indeed, EPA did not accept [MCWC's] 1998 recommendations but instead made significant changes. [MCWC] segregated its list of impaired waters into three categories, recommending different requirements for each category of impaired waters. By rejecting this categorization and imposing different requirements than those recommended by the [MCWC], EPA was the final arbiter as a matter of both fact and law. While EPA may have rendered a final decision for purposes of judicial review, it is clear that the [MCWC] did not.
>
> Plaintiff's amended petition is hereby dismissed with prejudice for lack of subject matter jurisdiction because the defendants did not render a final decision subject to judicial review. The EPA may have rendered a final decision with respect to the 1998 list of impaired waters, but that agency's actions are beyond the purview of this court.

L.F. 462-463 (emphasis added).

Appellants appealed to the Missouri Court of Appeals. The Court of Appeals affirmed the Circuit Court's dismissal of Appellants' suit, but on a different ground. Although § 536.010(4)(c), R.S. Mo. was not addressed by the parties' briefs or argument, the Court of Appeals' Opinion held that the MCWC's challenged conduct was not "rulemaking" pursuant to that clause, which provides an exception to the MAPA definition of a "rule." Op. at 26. The Court of Appeals acknowledged that the Missouri Clean Water Law provides for review of any "final order[ ] or determination[ ]" by the Commission. Op. at 25 (quoting § 644.071, R.S. Mo.). However, the Court concluded that this jurisdictional grant was superseded by Chapter 536, and that the resulting "dilemma" between the MAPA and the Clean Water Law could be resolved only by the Legislature. As the Court of Appeals acknowledged, its decision wholly immunized future 303(d) lists from judicial review, Op. at 25, despite the significant cost of performing the required TMDL analysis, and the significant impact of that analysis on private parties like Appellants.

This Court granted Appellants' Application for Transfer on April 23, 2002.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIMS ON THE GROUND THAT RESPONDENTS' LISTING DECISION WAS NON-FINAL AND THEREFORE UNREVIEWABLE, IN THAT RESPONDENTS PROMULGATED ADMINISTRATIVE "RULES", AND MADE "DETERMINATIONS", SUBJECT TO REVIEW UNDER THE MISSOURI ADMINISTRATIVE PROCEDURE ACT AND THE MISSOURI CLEAN WATER LAW.

Baugus v. Director of Revenue, 878 S.W.2d 39 (Mo. banc 1994)

State of Mo. ex rel. State Tax Comm'n v. Luten, 459 S.W.2d 375 (Mo. banc 1970)

Tonnar v. Missouri Hwy. Comm'n, 640 S.W.2d 527 (Mo. App. W.D. 1982)

Senn Park Nursing Center v. Miller, 455 N.E.2d 153 (Ill. App. 1983), *aff'd*, 470 N.E.2d 1029 (Ill. 1984)

§ 644.026.1 R.S. Mo.

§ 644.071 R.S. Mo.

§ 536.010(4) R.S. Mo.

Supreme Court Rule 100.1

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CASE AND FAILING TO ENTER A DECLARATION THAT RESPONDENTS' PROMULGATION OF THE 1998 303(D) LIST WAS INVALID, IN THAT RESPONDENTS CLEARLY FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF THE MAPA AND THE MISSOURI CLEAN WATER LAW BEFORE PROMULGATING THE LIST, AND THE INCLUSION OF THE ENTIRE LENGTHS OF THE MISSOURI AND MISSISSIPPI RIVERS ON THE 303(D) LIST IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW, IN THAT RESPONDENTS FAILED TO IDENTIFY A "POLLUTANT" IMPAIRING THOSE WATERS, AND FAILED TO PROVIDE ANY EVIDENTIARY BASIS FOR THEIR FINDING THAT THOSE WATERS ARE IN FACT IMPAIRED BY A "POLLUTANT".

NME Hosp. v. Dept. of Social Servs., 840 S.W.2d 71 (Mo. banc 1993)

Missouri Hosp. Ass'n v. Air Conservation Comm'n, 874 S.W.2d 380 (Mo. App. W.D. 1994)

§ 536.021 R.S. Mo.

§ 536.200 R.S. Mo.

§ 536.205 R.S. Mo.

§ 644.036 R.S. Mo.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CLAIMS ON THE GROUND THAT RESPONDENTS' LISTING DECISION WAS NON-FINAL AND THEREFORE UNREVIEWABLE, IN THAT RESPONDENTS PROMULGATED ADMINISTRATIVE "RULES", AND MADE "DETERMINATIONS", SUBJECT TO REVIEW UNDER THE MISSOURI ADMINISTRATIVE PROCEDURE ACT AND THE MISSOURI CLEAN WATER LAW.

Respondents' promulgation of the 1998 303(d) list was clearly a "rule" subject to review under the MAPA. In a provision ignored by both the Circuit Court and the Court of Appeals, the Missouri Clean Water Law expressly provides that Respondents *must* act by rulemaking when they seek to "implement and effectuate the * * * duties * * * required of this state by an federal water pollution act * * *." § 644.026.1(8) R.S. Mo. But beyond this specific statutory requirement, Respondents' action also clearly falls within the MAPA's generally applicable definition of a "rule": it has general applicability; it affects the substantive and procedural rights of the public generally, and of Appellants' members in particular; and it clearly "prescribes" and "implements" Missouri's policy of preserving and improving the quality of Missouri waters. The fact that EPA may have reviewed and approved Respondents' actions does not impact the character of those actions themselves (ironically, EPA disclaimed the ability to review Respondents' listing of the Missouri and Mississippi, suggesting that the State had voluntarily chosen to list those waters even though they do not satisfy § 303(d) standards).

Even if it were not a "rule", however, Respondents' actions were nonetheless subject to judicial review, since the Missouri Clean Water Law expressly provides for review of "all final orders or determinations" made by Respondents under that statute. This specific judicial review provision clearly controls this proceeding, even though the MAPA may provide for review in a narrower class of cases. And Respondents' actions clearly constitute "determinations" under the ordinary meaning of that term, since they constitute the resolution of a factual dispute – are the Missouri and Mississippi Rivers impaired by a "pollutant"? – and adopt a plan of action for the State's response to impaired waters.

Although the Circuit Court and the Court of Appeals dismissed Appellants' claims for diferent reasons, none of their proffered justifications for dismissal is persusasive. First, both courts ignored the Clean Water Law's mandate that Respondents act by rule in just these circumstances, and they both failed to give effect to the Clean Water Law's authorization of judicial review of MCWC "determinations," not just rules. Further, by harping on the purported lack of a "final decision," the Circuit Court appears to have mistaken this rulemaking challenge for judicial review of agency adjudications. The Court of Appeals' conclusion that the 303(d) list is merely an intergovernmental communication, not a reviewable "rule", is likewise unconvincing, since the court ignored the significant impact of Respondents' actions on the State itself, due to the tremendous expenditures required to develop TMDLs, on the Missouri public generally, and on Appellants' members in particular.

A. Standard of Review

> When reviewing the propriety of the dismissal of a petition, the court examines the pleading allowing the broadest intendment, treating all facts alleged as true and construing the allegations in favor of the pleader, to determine whether they invoke principles of substantive law which would entitle the plaintiff to relief.

Willamette Industries, Inc. v. Clean Water Comm'n, 34 S.W.3d 197, 200 (Mo. App. W.D. 2000), citing *Hagely v. Board of Educ. of Webster Groves School District*, 841 S.W.2d 663, 665 (Mo. banc 1992). Of particular applicability to this case, "[t]he test for sufficiency of a petition for declaratory judgment is not whether plaintiff is entitled to the relief requested, but whether he is entitled to a declaration of rights or status on the pleaded facts." *Id.*, citing *Cooper v. State*, 818 S.W.2d 653, 655 (Mo. App. W.D. 1991).

B. Missouri's 1998 303(d) List was a "Rule", both Because the Missouri Clean Water Law Required the Commission to Act by Rulemaking in These Precise Circumstances, and Because Respondents' Actions Fall within the MAPA Definition of a "Rule".

1. Under the Missouri Clean Water Law, the Commission Must Act by Rule Whenever it Seeks To Implement or Effectuate Duties Imposed by Federal Pollution Control States.

Although the Circuit Court and the Court of Appeals both concluded that Respondents' promulgation of the 1998 Missouri 303(d) list was not a "rule", both courts ignored the fact that the

Missouri Clean Water Law itself mandates that the MCWC act *only* by formal rulemaking in discharging its duties under the federal Clean Water Act. Specifically, § 644.026.1 of Missouri's Clean Water Law provides that:

> The Commission *shall*
>
> * * *
>
> (8) *Adopt*, amend, promulgate or repeal after due notice and hearing, *rules and regulations to enforce, implement and effectuate the powers and duties* of sections 644.006 and 644.141 and any *required of this state by any federal water pollution control act*, and as the commission may deem necessary to prevent, control and abate existing or potential pollution.

§ 644.026.1 R.S. Mo. (emphasis added); *see also* § 644.026.1(7) R.S. Mo. (Commission shall, "[a]fter holding public hearings, identify waters of the state and prescribe water quality standards for them * * * pursuant to any federal water pollution control act * * *").

Lest there be any doubt, § 644.026.2 R.S. Mo. expressly states that "[n]o rule or portion of a rule promulgated pursuant to this chapter shall be effective unless it has been promulgated pursuant to Chapter 536, R.S. Mo. [*i.e.*, the MAPA]."

Thus, Missouri statutes expressly provide that, in "implementing or effectuating the duties required by any federal water pollution control act," Respondents *must* adopt "rules and

regulations" when implementing the federal mandates under the Clean Water Act.[3] Yet, in finding that Appellants had no right to judicial review, neither the Circuit Court nor the Court of Appeals so much as cited, let alone discussed, § 644.026.1.

This Court must enforce the statutory command that the MCWC can only discharge its duties under the federal Clean Water Act by rulemaking. This Court's primary role in construing statutes "is to ascertain the intent of the legislature from the language used and, if possible, give effect to that intent." *Callahan v. Cardinal Glennon Children's Hosp.*, 901 S.W.2d 270, 273 (Mo. App. E.D. 1995), citing *Magee v. Blue Ridge Professional Bldg. Co.*, 821 S.W.2d 839, 845 (Mo. banc 1991). In its attempt to determine legislative intent, this Court will presume that "the legislature had knowledge of the law, the surrounding circumstances, and the purpose and object to be accomplished." *Id.*, citing *Person v. Scullin Steel Co.*, 523 S.W.2d 801, 803 (Mo. banc 1975).

Under the Missouri Clean Water Law, Respondents are required to provide "due notice and hearing" prior to enacting rules and regulations implementing or effectuating any duties "required of this state by any federal water pollution control act." § 644.026.1(8) R.S. Mo. It is uncontroverted that the federal Clean Water Act required Respondents to promulgate the list of impaired waters Appellants challenge in this action. *See* 33 U.S.C. § 1313(d)(1)(A), L.F. 048. Since in promulgating Missouri's 303(d) list Respondents were effectuating and implementing duties

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[3] In this regard, it is instructive that, in compliance with § 644.026.1(8) R.S. Mo. (as well as the MAPA), Respondents do follow formal rulemaking procedures in formulating water quality standards under § 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c).

required by the Clean Water Act, the Missouri Clean Water Law required that they act by rulemaking, and comply with the rulemaking procedures specified by both the Clean Water Law and the MAPA.

2. Adoption of Missouri's 1998 303(d) List is a "Rule" under the MAPA's Generally Applicable Definition.

Besides the express command in the Clean Water Law that Respondents act only by rulemaking in these precise circumstances, promulgation of the 1998 303(d) list also plainly falls within the MAPA's generally applicable definition of a "rule". The MAPA defines a "rule" as:

> * * * each agency statement of general applicability that *implements, interprets or prescribes law or policy*, or that describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of an existing rule * * *.

§ 536.010(4) (emphasis added) (the text of this provision is reproduced in the Appendix at A-029). Pursuant to this definition, it is clear that Respondents' issuance of the 1998 § 303(d) is an action of "general applicability," and clearly "implements, interprets or prescribes" the law and policy of the State of Missouri. Accordingly, Respondents' actions were reviewable as a "rule" under § 536.050.1 R.S. Mo.

First, Respondents' actions in promulgating the 303(d) list had "general applicability" to Missouri citizens. The 303(d) list encompasses 165 bodies of water located throughout the State. By listing these waterbodies, Respondents have stated their conclusion that these waters are "impaired" by at least one "pollutant" and, therefore, should be subject to further potentially

significant TMDL restrictions. The overwhelming majority of citizens in the State of Missouri live within the watersheds adjoining these 165 bodies of water. Each and every one of those citizens have had their rights, both substantive and procedural, impacted by Respondents' actions.

In short, the 303(d) list affects all of the listed waters, and all persons or entities whose activities may impact the listed waters; it does not merely adjudicate the rights of particular, named individuals. As noted in *Bruemmer v. Missouri Dept. of Labor Relations*, 997 S.W.2d 112 (Mo. App. W.D. 1999), "a rule is '[a]n agency statement of policy or interpretation of law of future effect which acts on unnamed or unspecified persons or facts." *Id*. at 116 (citations omitted). Respondents' action clearly satisfies this "general applicability" requirement.

Second, in promulgating the 1998 303(d) list, Respondents clearly "prescribed" and "implemented" governmental policy. The Missouri Clean Water Law (§ 644.006 R.S. Mo. *et seq*.) confirms Missouri's public policy of seeking to maintain clean water. Originally enacted in 1972, the Clean Water Law contains the following policy statement:

> * * * whereas this state must possess the authority required of states in the Federal Water Pollution Control Act as amended if it is to retain control of its water pollution control programs, it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain and improve the quality thereof * * * to provide for the prevention, abatement and control of new and existing water pollution; and to cooperate with other agencies of the state * * * the federal government and any other persons in carrying out these objectives.

§ 644.011 R.S. Mo.

It is undeniable that Respondents' promulgation of the 303(d) list constituted an attempt to implement this public policy – the *entire purpose* of the listing is to "to conserve the waters of the state and to protect, maintain and improve the quality thereof," which § 644.011 R.S. Mo. explicitly declares to be "the public policy of this state." Because the 303(d) list serves as the cornerstone for the regulation of water pollution, this inventory of all of the State's "impaired" waters constitutes Missouri's "statewide policy" on the subject. Accordingly, Respondents' actions in promulgating the 1998 303(d) list constituted rulemaking under Missouri law and, therefore, to be valid must comply with the applicable provisions of the MAPA.

This Court provided additional guidance regarding the meaning of a "rule" in *Baugus v. Director of Revenue*, 878 S.W.2d 39 (Mo. banc 1994), where it stated:

> Implicit in the concept of the word "rule" is that the agency declaration has the potential, however slight, of impacting the substantive or procedural rights of some member of the public. Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract.

Id. at 41.

Respondents' promulgation of the 303(d) list clearly meets the *Baugus* criterion that it "ha[ve] the potential, however slight, of impacting the substantive or procedural rights of some member of the public." *First*, Appellants' Petition explicitly alleges a variety of harms flowing to the Appellant organizations, and their members, as a direct result of the 303(d) listing, and the TMDLs which must, by law, follow a 303(d) listing. These harms include:

a. changes in land management practices * * *;

b. limitations on land where particular crops, including but not limited to soybeans, can be grown * * *;

c. limitations on sales and use of products, including but not limited to fertilizers, pesticides and herbicides * * *;

d. limitations on crop rotation * * *;

e. decreased crop yields * * *;

f. increased costs and decreased use of agricultural products and services * * *;

g. increased equipment and raw material costs and decreased equipment sales * * *;

h. limitations on production and/or manufacturing quantity and quality * * *;

i. limitations or changes in NPDES point source effluent limitations * * *;

j. increased cost of water treatment * * *;

k. restrictions on locations for production or manufacturing * * *; and

l. limitations on raw materials that can be used in production or manufacturing * * *.

L.F. 009-010.

But the effects of the 303(d) list are not limited to private parties. Because of their inclusion on the 303(d) list, Missouri will now be required to establish "Total Maximum Daily Loads" for various pollutants on the Mississippi and Missouri Rivers, at a cost of untold millions of dollars.

Further, the harms to private parties are not limited to financial effects – private parties' "procedural rights" have also been infringed by the listing action. The federal Clean Water Act, and the Missouri Clean Water law, specifically mandate the procedures which the State must follow before developing TMDLs – by rulemaking, and after a public hearing, the MCWC must make an adequately supported, technical determination that particular waters are "impaired" by a "pollutant", and that TMDL development is therefore warranted. The essence of Appellants' claims is that the MCWC failed to comply with these statutorily-mandated procedures, and has instead issued a technically unsupported decision that the entire lengths of the Missouri and Mississippi Rivers are "impaired" by a "pollutant" designated as "habitat loss," without affording the public prior notice or an opportunity to comment. By denying Missouri citizens the technically supportible, publicly bruited determination of "impairment" to which they are statutorily entitled, Respondents clearly infringed Appellants' procedural rights.

3. EPA's Subsequent Review and Approval of Missouri's 1998 303(d) List Does Not Nullify its Status as a "Rule".

The trial court dismissed Appellants' claims, without considering them on the merits, based on its conclusion that only EPA, and not Respondents, made a "final decision for purposes of judicial review."

Though EPA is responsible for approving each State's 303(d) list, under the Federal Clean Water Act each State, not EPA, is clearly responsible for "identify[ing] those waters within its boundaries for which the effluent limitations * * * are not stringent enough to implement any water quality standard applicable to such waters." Clean Water Act, § 303(d)(1)(A), 33 U.S.C. §

1313(d)(1)(A). The Act further mandates that each state prepare TMDLs for all waters which are contained on its 303(d) list. 33 U.S.C. § 1313(d)(1)(C).

Even though generation of a 303(d) list is done pursuant to a federal mandate, under the Clean Water Act *States* bear the primary responsibility for generating the lists. Thus, even though EPA maintains authority to approve each State's submission, that power does not nullify the existence of a state administrative rule. This is particularly true here, where EPA refused to consider comments on the waters Respondents had placed on the 303(d) list, and suggested that it had no authority to review the State's inclusion of the Missouri and Mississippi on the list, since Respondents may have listed those waters even though they did not meet § 303(d) criteria. L.F. 393-394.

By dismissing Appellants' cause of action, the trial court endorsed a philosophy that state agencies may adopt sweeping policy changes without public input, so long as the federal government plays some role in the process. Yet, such a determination flies in the face of the MAPA, the Missouri Clean Water Law and Missouri's common law.

In a case almost directly on point, the Missouri Court of Appeals has held that even in situations where the federal government has authority to finally approve a document generated by a state administrative agency, the state agency's actions nevertheless constitute rulemaking under the MAPA. *Tonnar v. Missouri State Highway and Transportation Comm'n*, 640 S.W.2d 527 (Mo. App. W.D. 1982).

In *Tonnar*, the court held that the Missouri Highway Commission had engaged in an improper rulemaking when it adopted a "Right-of-Way" manual pursuant to a federal delegation of

authority, but without following the MAPA requirements. The *Tonnar* court concluded that notwithstanding the requirement of federal government approval, "[t]he contents of the manual are [ ] rules within the definition of § 536.010 RSMo 1978.'" 640 S.W.2d at 531 (citation omitted). Consequently, the *Tonnar* court held that the manual which was adopted without adhering to the MAPA notice and comment proceedings was void and of no effect. *Id*.

An Illinois appellate court reached the same conclusion in *Senn Park Nursing Center v. Miller*, 455 N.E.2d 153 (Ill.App. 1983), *aff'd*, 470 N.E.2d 1029 (Ill. 1984). *Senn Park* held that, even when a rule's "legal effect is contingent upon approval by a federal agency," the state was nonetheless governed by the Illinois APA. 455 N.E.2d at 157. The *Senn Park* court also noted that the Illinois APA did *not*:

> even suggest that a federal approval requirement would have any effect on the characterization of an agency statement as a rule. Thus, we will not read an autonomy requirement into the definition of a rule.

Id.

Similarly, the MAPA contains no exclusion for agency actions which require federal approval prior to enactment. *See* § 536.010(4) R.S. Mo. Thus, under *Tonnar*, EPA's involvement in finally approving Missouri's § 303(d) list is immaterial to whether Respondents enacted a "rule".

C. Even if it Is not a "Rule", Respondents' Adoption of the 1998 303(d) List Was a "Determination" which the Missouri Clean Water Law Explicitly Makes Subject to Judicial Review.

Quite apart from the judicial review provisions of the MAPA, the Missouri Clean Water Law contains its own judicial review provision. That provision states:

> **Judicial review authorized**.–1. *All final orders or determinations of the commission* or the director made pursuant to the provisions of sections 644.006 to 644.141 *are subject to judicial review* pursuant to the provisions of chapter 536, RSMo. No judicial review shall be available, however, unless and until all administrative remedies are exhausted.
>
> 2. In any suit filed pursant to section 536.050, RSMo, concerning the validity of the commission's standards, rules and regulations, the court shall review the record made before the commission to determine the validity and reasonableness of such standards, rules, limitations and regulations and may hear such additional evidence as it deems necessary.

§ 644.071 R.S. Mo.

The Circuit Court failed to even address this provision. While the Court of Appeals recognized the potential applicability of § 644.071, it effectively equated § 644.071's reference to "final orders and determinations" with MAPA's definition of a "rule":

> We [ ] acknowledge that the legislature has authorized judicial review under the Missouri Clean Water Law, § 644.071, which provides that "all final orders or determinations of the commission or the director made pursuant to the provisions of section 644.006 to 644.141 are subject to judicial review pursuant to the provisions of chapter 536, RSMo." If Chapter 536 provides no avenue of review for 303(d)

> lists, we must presume the legislature was aware of § 536.010(4)(c) at the time § 644.071 was enacted. *See Suffian v. Usher*, 19 S.W.3d 130, 133 (Mo. banc 2000). Thus, *this is a dilemma that must be resolved, if at all, by the legislature* * * *.

Op. at 25, App. at A-025 (emphasis added).

The Court of Appeals acted contrary to Missouri law by ruling that its narrow reading of the definition of a "rule" not only precluded review under the MAPA, but also prohibited review under the specific, later-enacted, *and broader* judicial review provisions of the Missouri Clean Water Law, § 644.071, R.S. Mo. In so ruling, the Court of Appeals failed to follow Missouri law requiring that statutes be harmonized, and that precedence be given to later-enacted, more specific statutes. Rather than seeking to reconcile §§ 536.010(4)(c) and 644.071, the Court simply threw up its hands, stating that this "dilemma" (of its own creation) was for the Legislature, not the court, to resolve. The court's analysis erroneously permits the older, more general statute (§ 536.010(4)(c)) to repeal by implication the newer and more specific statute (§ 644.071).

In 1973, the Missouri Legislature provided for judicial review not merely of "rules", but of all of the Commission's "*final orders or determinations*." § 644.071(1), R.S. Mo. This grant of jurisdiction to review "final orders or determinations" *must* mean something more than review of "rules", because *judicial review of Commission "rules" was already afforded under the MAPA before § 644.071 was even enacted* – the Commission clearly falls within the MAPA's definition of an "agency" (§ 536.010(1)), and all "rules" issued by agencies are subject to judicial review under § 536.050(1). If, as the Court of Appeals found, § 644.071 simply

repeats the MAPA's existing jurisdictional grant (which dates back to 1945), it is meaningless and redundant.

Under Missouri law, "the legislature is not presumed to have intended a meaningless act." *Murray v. Missouri Hwy. & Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. 2001). Additionally, courts must attempt to harmonize statutes they believe to be in conflict, and must give precedence to the more specific, and later-enacted, statute when harmonization is not possible. *Farmers' Elec. Coop. v. Missouri Dep't of Corrections*, 977 S.W.2d 266, 270 (Mo. 1998); *Goldberg v. Administrative Hrg. Comm'n*, 609 S.W.2d 140, 144 (Mo. banc 1980).

In this case, the Court of Appeals did not even attempt to harmonize the two statutory provisions at issue -- instead, it simply invalidated § 644.071 entirely. Effectively (but without actually saying so), the court held that its narrow reading of MAPA's definition of a "rule" repealed by implication the specific jurisdictional grant contained in § 644.071. By equating the phrase "final orders or determinations" in § 644.071 with the MAPA's definition of a "rule", the Court rendered § 644.071 meaningless surplusage.

This "repeal by implication," especially absent any effort at harmonization, runs contrary to Missouri law. *St. Charles County v. Director of Rev.*, 961 S.W.2d 44, 47 (Mo. 1998). It is especially disturbing in this appeal, because the statutes at issue are in harmony – § 644.071 provides for review of Water Commission "final orders and determinations," even if they do not fall within the MAPA definition of a "rule".

Besides violating general canons of statutory construction, the Court of Appeals' refusal to give § 644.071 a meaningful reading also violates fundamental principles of Missouri administrative

law. As explained by Judge Paul M. Spinden, under Missouri administrative law "[t]he specific statute [governing a particular administrative agency], of course, prevails when there is any variance between it and Chapter 536." 1 Mo. Administrative Law § 4.17, at 4-19 (Mo. Bar 3d ed. 2000). This straightforward principle, that provisions concerning judicial review of a specific agency's actions control over the generally-applicable provisions of the MAPA, is also reflected in the Rules of Civil Procedure promulgated by this Court. Rule 100.01 provides:

> The provisions of sections 536.100 through 536.150, RSMo, shall govern procedure in circuit courts for judicial review of actions of administrative agencies *unless the statute governing a particular agency contains different provisions for such review.*

(Emphasis added).

As this Court explained more than 30 years ago, in situations where an agency's organic statute contains judicial review provisions different from, or in addition to, the MAPA provisions, a reviewing court should give precedence to the specific provisions of the agency's organic statute, and supplement those procedures, where necessary, with the provisions of the MAPA:

> When a court review of any administrative body is sought, it is first logical to see if there are any specific provisions for the same in the statutes relating to the particular agency. * * * If such provisions do not detail all factors involved, then the general provisions of Supreme Court Rule 100, "Administrative Review," should be followed to supplement such inadequacies.

State of Mo. ex rel. State Tax Comm'n v. Luten, 459 S.W.2d 375, 378 (Mo. banc 1970), *quoted in, e.g., In re Application of Osage Water Co.*, 51 S.W.3d 58, 63 (Mo. App. W.D. 2001). For a recent example of the use of the MAPA to supplement the judicial review provisions of an agency's organic statute, *see, e.g., Wolfner v. Board of Adjustment*, 39 S.W.3d 76, 78 (Mo. App. E.D. 2001) ("Because section 89.110 [providing for judicial review of decisions of boards of adjustment] fails to include a notice provision, we look to section 536.110 to supplement the inadequacy.").

Under *Luten*, this Court must first look to the Missouri Clean Water Law, and give effect to the provision of that statute providing for judicial review of "all final orders or determinations"of the Commission, and look to the MAPA *only* to "fill in the details" of the manner in which judicial review shall proceed. Here, however, the Court of Appeals took exactly the opposite approach – the court *first* looked to the MAPA's general provisions governing judicial review, and *then* held that the specific review provisions in the MCWC's governing statute were either redundant, or repealed by implication.

Even if it is not a "rule", the Commission's promulgation of the 1998 303(d) list is clearly a "determination" explicitly subject to review under § 644.071 of the Clean Water Law. A fundamental canon of Missouri statutory construction is that "[s]tatutory terms are considered in their plain or ordinary and usual sense," and, in particular, by reliance on common dictionary definitions of the words used. *Fidelity Security Life Ins. Co. v. Director of Rev.*, 32 S.W.3d 527, 528-29 (Mo. 2000). A standard dictionary defines a "determination" as:

> the settling and ending of a controversy esp. by judicial decision * * *[;] the resolving of a question by argument or reasoning * * *[;] the act of deciding definitely and firmly esp. regarding a course of action * * *.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED at 616 (1993).

The MCWC's promulgation of the 1998 303(d) list is clearly a "determination" under the common meaning of that term. The MCWC's promulgation of the 303(d) list "settled a controversy" and "resolved a question": namely, whether the Missouri and Mississippi Rivers were impaired by "pollutants." Further, by promulgating the list, the MCWC "decided on a course of action": namely, to subject the Missouri and Mississippi Rivers to heightened regulatory scrutiny with an eye towards the development of TMDLs for those waters.

The Commission's 303(d) list was clearly a "determination" that certain waters were impaired, and that further, intensive oversight and regulation of those waters was required. Appellants thus clearly had a right to judicial review of the list under § 644.071, and the Court of Appeals erred by effectively ignoring this alternative jurisdictional basis for Appellants' suit.

D. The Rationales Offered by the Circuit Court and the Court of Appeals for Refusing to Consider Appellants' Claims Are Unconvincing.

In holding that they had no subject-matter jurisdiction to consider Appellants' claims, both the Circuit Court and the Court of Appeals made at least three errors: *first*, each court failed to recognize that the Missouri Clean Water Law explicitly requires that the MCWC's implementation of the federal Clean Water Act must occur by rulemaking; *second*, each court failed to recognize that promulgation of the 1998 303(d) list plainly falls within the MAPA's definition of a "rule", since it has general applicability, and prescribes and implements Missouri's policy "to conserve the waters of the state and to protect, maintain and improve the quality thereof," § 644.011 R.S. Mo.; and *third*, each court failed to give effect to § 644.071 R.S. Mo., which provides for judicial review not only of "rules", but of all of the MCWC's "final orders or determinations."

Beyond these common errors, however, the Circuit Court and the Court of Appeals offered somewhat different rationales for refusing to consider Appellants' claims. As described below, those rationales are unpersuasive, and cannot justify the courts' refusal to consider Appellants' claims on the merits.

1. The Circuit Court Erred in Relying on the Supposed Lack of a "Final Decision Subject to Judicial Review," Since Appellants Are Challenging an Agency Rulemaking, not an Adjudication.

In its Order and Judgment, the trial court continuously referred to the fact that, in its view, Respondents had not made a "final decision subject to judicial review." L.F. 462-463. Although Appellants' Second Amended Petition clearly stated that they were challenging a "rule", *see, e.g.*, L.F. 008, 012, by its consistent use of the term "final decision," it appears that the trial court erroneously confused this declaratory judgment action with judicial review of agency adjudications.

Under the MAPA, there are separate methods for challenging an agency's adjudicative actions ("contested" and "non-contested" case decisions) and an agency's rulemaking actions. Moreover, under Missouri law, there does not need to be a "final decision" before a party challenges a rulemaking. Instead, Missouri courts have express authority to entertain declaratory judgment suits challenging rules "whether or not the plaintiff has first requested that the agency pass upon the question presented," § 536.050.1 R.S. Mo., and whether or not the agency has actually moved to enforce the challenged rule against the plaintiff.

Thus, in *Group Health Plan, Inc. v. State Board of Registration for the Healing Arts*, 787 S.W.2d 745 (Mo. App. E.D. 1990), the Court of Appeals reversed the trial court's subject matter jurisdiction dismissal of a § 536.050 declaratory judgment action, even though the administrative agencies had merely *threatened*, but had not yet acted, to enforce their rules. *Id.* at 749. Further, in *Group Health*, similar to this case, "[t]here simply was no decision by the

administrative agency to be heard or appealed." *Id*. at 748. Notwithstanding the absence of any "decision" or adjudicative action, the *Group Health* court held:

> The courts have jurisdiction to render declaratory judgments questioning the validity of a rule or threatened application thereof. * * * In the absence of a pending administrative action, the trial court has subject-matter jurisdiction to adjudicate plaintiffs' action.

Id. at 749.

Because neither a "final decision," nor indeed *any* "decision", was required before Appellants instituted their action for declaratory judgment, the trial court's dissmisal is erroneous, and must be reversed.

2. The Court of Appeals Erred in Relying on the MAPA's Exclusion of Interagency Communications from the Definition of a "Rule", Since Respondents' Challenged Actions Clearly Had a Direct and Immediate Effect on the Missouri Public Generally, and on Appellants in Particular.

The Court of Appeals refused to review the merits of Appellants' challenges, in reliance on § 536.010(4)(c), R.S. Mo., which excludes from the MAPA's definition of a "rule":

> An intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.

(This provisions was neither briefed nor raised by the parties, nor was it raised by the Court at oral argument.) According to the Court of Appeals, the final 303(d) list fell within this exclusion, because it "does not *substantially* affect the legal rights of, or procedures available to, the public." Op. at 23 (emphasis in original).

The Court of Appeals' conclusion that the 303(d) list "does not substantially affect the legal rights of * * * the public" is flawed in at least two respects. *First*, the Court ignored that the public has been dramatically impacted by the promulgation of the list. As described in greater detail above, Appellants' Petition alleges that Respondents' promulgation of the 303(d) list has a direct and immediate effect on Appellants' members. *See* L.F. 009-010. Further, Appellants and the public generally have lost the benefits of the 303(d) process, which is a statutorily mandated procedure meant to insure that the massive expenditure for TMDL development, and the massive expenditures necessary to comply with any TMDLs, are only incurred for those waters for which there is a technically supportible determination of impairment by a "pollutant", after appropriate public input.

Further, the Court of Appeals' determination that neither Appellants nor the public generally are "substantially affected" ignores that a TMDL analysis *must* be conducted for all listed waters. This analysis will cost the State untold millions, and will require access to property and businesses owned by Appellants. Once complete, this analysis will be the basis for restrictions on landowners and businesses that affect the waters at issue. These restrictions cloud the property of Appellants

and restrict their ability to use, enjoy and conduct business on it. The Commission's action clearly and substantially affects a large and significant "segment" of the public, and is therefore a "rule".[4]

Second, the Court of Appeals failed to consider or give effect to the language of § 536.010(4)(c) providing that an action is a rule if it affects "the public *or any segment thereof*." In fact, after first quoting the provision, Op. at 19, the Court acted as if the emphasized language did not exist. Op. at 20-23. By doing so the Court failed to recognize that the legislature clearly contemplated that a "rule" need not affect the public at-large, but need only impact a single identifiable segment of the public.

The phrase "or any segment thereof" is a key limitation on the scope of the exception codified at § 536.010(4)(c). This provision excludes from the definition of a rule inter- and intra-governmental communications with one condition – that these communications do not substantially impact the legal or procedural rights of any single segment of the public. By striking this key phrase, the Court of Appeals expanded the scope of the § 536.010(4)(c) exception far beyond what the Legislature intended. The Court's analysis also flouts a bedrock principle of statutory construction:

> It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superflous language in a statute.

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[4] As noted in the Opinion, several courts have already ruled that a State's formulation of a § 303(d) list is indeed a rulemaking activity. Op. at 24.

Hyde Park Housing Partnership v. Director of Rev., 850 S.W.2d 82, 84 (Mo. 1993); *see also Gott v. Director of Rev.*, 5 S.W.3d 155, 158 (Mo. 1999). The Court acted contrary to this principle by ignoring the critical statutory phrase "or any segment thereof."

Compounding its error, the Court of Appeals justified its expansive reading of § 536.010(4)(c) by relying on caselaw interpreting a Michigan statute *which does not even include this critical phrase*. The Michigan statute excludes from the definition of a "rule" actions "that do[ ] not affect the rights of * * * the public," (Op. at 20, quoting Mich. Comp. Law § 24.207 (2001)), *omitting the "or any segment thereof" language found in the Missouri statute*. The Michigan exception is thus much broader than § 536.010(4)(c), rendering the Michigan law completely irrelevant here.

This key difference between Missouri and Michigan laws is underscored by the Michigan appellate case the Court of Appeals cited. *Kent County Aeronautics Bd. v. Department of State Police*, 609 N.W. 2d 593 (Mich. App. 2000), found that agency action was not rulemaking because it did not affect "the public's rights." *Id.* at 604. The court specifically held that "public rights" did not include individual citizens' property rights. *Id.* Obviously, the analysis under § 536.010(4)(c)'s "or any segment thereof" language would have been completely different.

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' CASE AND FAILING TO ENTER A DECLARATION THAT RESPONDENTS' PROMULGATION OF THE 1998 303(D) LIST WAS INVALID, IN THAT RESPONDENTS CLEARLY FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF THE MAPA AND THE MISSOURI CLEAN WATER LAW BEFORE PROMULGATING THE LIST, AND THE INCLUSION OF THE ENTIRE LENGTHS OF THE MISSOURI AND MISSISSIPPI RIVERS ON THE 303(D) LIST IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW, IN THAT RESPONDENTS FAILED TO IDENTIFY A "POLLUTANT" IMPAIRING THOSE WATERS, AND FAILED TO PROVIDE ANY EVIDENTIARY BASIS FOR THEIR FINDING THAT THOSE WATERS ARE IN FACT IMPAIRED BY A "POLLUTANT".

A. Respondents' Promulgation of the Missouri 303(d) List Violated the Procedural Requirements Imposed by the MAPA and the Missouri Clean Water Law.

As explained above, Missouri's 303(d) list clearly constituted an administrative rule. The next question is whether or not Respondents complied with the rulemaking requirements of the

MAPA and the Missouri Clean Water Law in promulgating it. It is undisputed that Respondents did not. Thus, Missouri's 1998 303(d) list is invalid.

The MAPA requires state administrative agencies to: (1) provide notice to the public of proposed rules, and an opportunity to comment; and (2) prepare a fiscal note prior to engaging in administrative rulemaking. §§ 536.021, 536.200 and 536.205 R.S. Mo. The Missouri Clean Water Law goes further, and requires that Respondents hold a public hearing, on at least 30 days' prior notice, before promulgating any rule. § 644.036.1 R.S. Mo. In enacting Missouri's 1998 303(d) list, Respondents clearly failed to comply with these requirements.

Although Appellants' notice arguments specifically relate to the eleventh-hour addition of the Missouri and Mississippi Rivers to the 303(d) list, Appellants' overarching claims – that the 303(d) list was a "rule" subject to the MAPA's full panoply of rulemaking procedures, and that Respondents were required to estimate the public and private financial impacts of their actions – apply to the entirety of the 303(d) list. Because of Respondents' failure to comply with these fundamental requirements, the entirety of the 1998 303(d) list must be declared invalid.

1. Respondents Furnished No Opportunity for Notice and Comment Prior to Adding the Missouri and Mississippi Rivers to Missouri's 303(d) List.

Prior to the September 23, 1998 meeting where Missouri's § 303(d) list was adopted, Respondents gave absolutely no public indication that they intended to add Missouri's two largest bodies of water to the list of waters for which TMDLs would be necessary. In fact, all of

Respondents' communications concerning the Missouri and Mississippi Rivers were to the contrary.

Prior to passage of the 303(d) list, Respondent MDNR issued four public notices concerning the generation of Missouri's § 303(d) list. The Missouri and Mississippi Rivers were only mentioned in two of those communications.

On March 20, 1998, MDNR issued a list of waters which commenters, *but not the agency*, had suggested for potential listing. The Missouri and Mississippi Rivers were contained on this list. It should be noted that this was the only time that the two great bodies of water appeared on any list issued by Respondents prior to final ratification of the § 303(d) list.

On August 14, 1998, MDNR issued a list of waters which *the agency* recommended for listing. Notably, the Missouri and Mississippi Rivers were *not* contained on this recommended list. More specifically, MDNR explained that the Missouri and Mississippi Rivers were not being listed "because there are no water quality contaminant violations" for those waters. L.F. 192-193. The only conclusion the public could draw from this chain of events is that, although at least one member of the public had suggested listing the Missouri and Mississippi (for an unspecified pollutant),

MDNR had reviewed the available data, and had affirmatively concluded that there was no justifiable basis to do so.

In their September 23, 1998 meeting, Respondents suddenly, and without warning, changed their stance concerning the Missouri and Mississippi Rivers. Notably, Respondents altered their position despite the fact that there was no evidence or record which demonstrated that the Missouri and Mississippi Rivers should be added to Missouri's 303(d) list.

The MAPA's notice and comment requirements, and the Missouri Clean Water Law's hearing requirement, exist to prevent exactly the type of "regulation by ambush" practiced by Respondents in this case. Here, Respondents made a substantial change to Missouri's 303(d) list which was directly contrary to the facts, *and to MDNR's previously announced technical assessment*, but never revealed their intentions to the public prior to the agency action itself.

Section 536.021 R.S. Mo. specifically provides:

No rule shall hereafter be made, amended or rescinded by any state agency unless such agency shall first file with the secretary of state a notice of proposed rulemaking and a subsequent order of rulemaking, both of which shall be published in the Missouri Register by the secretary of state as soon as practicable after the filing thereof in his office; except that a notice of proposed rulemaking is not required for the establishment of hunting or fishing seasons and limits or for the

establishment of state program plans required under federal education acts or regulations.

Under Missouri law, "[p]romulgation of a rule requires compliance with the rulemaking procedures specified in § 536.021." *NME Hospitals v. Department of Social Services*, 850 S.W.2d 71, 74 (Mo. banc 1993). As further stated in *NME Hospitals*:

> Section 536.021 sets forth the notice and comment procedures for rulemaking, amending and rescinding. The purpose of the notice and comment procedures is to provide information to the agency through statements of those in support or opposition to the proposed rule.

Id.

In clear violation of the MAPA requirements, the citizens of Missouri were never given the requisite "explanation of any new rule or any change in an existing rule." § 536.021.2 R.S. Mo. Respondents failed to file anything with the Secretary of State disclosing their intent to place the Missouri and Mississippi Rivers on the 303(d) list. Finally, Respondents did not publish a proposed or final order of rule-making in the Missouri Register, and never submitted their proposed rule to the joint committee on administrative rules as mandated by§ 536.024 R.S. Mo. Obviously, by failing to give notice of their intentions, Respondents likewise violated the hearing procedures of § 644.036 R.S. Mo., and the requirement of 40 C.F.R. § 130.36(a), which explicitly requires States to give the public "no less than 30 days to review and comment on [the State's] list of impaired waterbodies."

Missouri courts hold that "[a] rule adopted in violation of § 536.021 is void." *NME Hospitals*, 850 S.W.2d at 74 (citations omitted). Because Respondents failed to comply with the MAPA or the Missouri Clean Water Law, their actions in steering through a last-minute, dramatic revision to Missouri's 303(d) list is void.

2. Respondents Failed to File a Fiscal Note in Support of Their 303(d) List

Moreover, Respondents never filed a fiscal note prior to adopting the 303(d) list. Respondents admit that their adoption of the 303(d) list had a significant financial impact. Yet, Respondents never gave the public any information about the financial ramifications of their decisions concerning the 303(d) list. L.F. 085, 238. Because Respondents acted outside of the express mandates of §§ 536.200 and 536.205 R.S. Mo., the 303(d) list is void and unenforceable.

Section 536.200 of the MAPA mandates that a fiscal note must be filed for any rulemaking activity:

> * * * which is estimated to cost more than five hundred dollars in the aggregate to any such agency or public subdivision * * * The fiscal note shall contain a detailed estimated cost of compliance and shall be supported with an affidavit by the director of the department to which the agency belongs that in the director's opinion the estimate is reasonably accurate.

Section 536.200 further specifies that failure to publish a fiscal note "shall render any rule promulgated thereunder void and of no force or effect." § 536.200 R.S. Mo.

Similarly, § 536.205 R.S. Mo. "requires agencies to make a threshold determination as to whether a proposed rule would cost *private entities* more than $500 in the aggregate." § 536.205 R.S. Mo. If the proposed rulemaking is expected to cost more than $500 to the public, the state agency is required to publish an additional fiscal note estimating the number of individuals and business entities likely to be affected. By law, the state agency must also classify the types of affected business to "give reasonable notice of the number and kind of businesses which would likely be affected" and estimate "the cost of compliance with the rule by the affected individuals or business entities." § 536.205.1(1) - (3) R.S. Mo.

Respondent MDNR recognizes that the 303(d) list will have a very large public economic impact on the State of Missouri. In fact, when asked how MDNR would allocate manpower for generating the necessary TMDLs for the 165 listed waters, an MDNR official estimated that it would take at least one full-time employee, working one full year, to perform a single TMDL on a single body of water. Thus, the cost for generating TMDLs pursuant to the 303(d) listing is enormous.

EPA estimates that it costs between $10,000 and $1 million to generate a single TMDL, depending upon the size of the waterway. Considering that the Missouri and Mississippi Rivers are the two largest waterways in the country, and are correspondingly Missouri's two largest bodies of water, logic dictates that TMDL generation for those two rivers would fall at the very high end of the cost spectrum.

MDNR's year 2000 proposed budget requested 32.5 employees and a financial allocation of $3.1 million to cover the cost of implementing the 303(d) list and performing the necessary

TMDLs for that year alone. Despite these staggering financial and manpower estimates, Respondents have never furnished Missouri citizens with *any* fiscal note detailing these anticipated public expenditures.

Besides the impact on the public fisc, Respondents did not even attempt to gauge the *private financial impact* of their decision. Instead of putting forth *any* effort to put Missouri citizens on notice of the possible private financial impact of the 303(d) listing and the TMDL regulations which will necessarily follow, MDNR stated that it was "very difficult to know" the financial impact on parties. However, "[o]nce a solution is identified, at that point [MDNR] could make some estimates as to what would be involved in obtaining that." L.F. 085.

Given the number of individuals and businesses who live and work near the Missouri and Mississippi Rivers, it is fairly safe to assume that restrictions on those bodies of water would have an impact of more than $500 in the aggregate. Thus, Respondent state agencies must not be allowed to ignore their statutory duties to provide notice of financial impact. In addition, Respondents should not be excused from their obligations because Respondents had a difficult time calculating the impact of the rule change.

> While preparation of aggregate cost estimates for rules which take longer to implement or are gradually phased in will obviously require more effort, we cannot say it would be impossible to [estimate or predict aggregate costs] * * *. The agency should attempt to estimate the cost of compliance in the aggregate for the foreseeable future. If, however, there will be ongoing costs of compliance which for some reason cannot be estimated in a reasonable fashion, *an appropriately*

> *worded statement to that effect would at least put the affected entities on notice that there are significant but unquantifiable future compliance costs*. The various possibilities are myriad, but we are confident that state agency administrators are capable of preparing cost estimates which comply with both the letter and spirit of §§ 536.200 and 536.205.

Missouri Hosp. Assn. v. Air Conservation Comm'n, 874 S.W.2d 380, 390 (Mo. App. W.D. 1994) (emphasis added).

Here, Respondents simply ignored their responsibility to generate fiscal notes on both the public and private impact of their actions. Under the MAPA:

> The object of the fiscal note requirement is the assurance that state agencies and, in turn, the legislature and the public are aware of the economic costs as well as the benefits of rulemaking actions.

Id. at 390 (citations omitted).

Respondents made no attempt to inform either the requisite state entities or private individuals of the considerable costs associated with the 303(d) list and in particular, the costs associated with adding the Missouri and Mississippi Rivers to that list. Thus, their failure to file a fiscal note which estimated or even "ballparked" the certain fiscal impact renders the 303(d) list "void and of no force and effect." §§ 536.200(3), 536.205(2) R.S. Mo.

B. Respondents' Promulgation of the 1998 303(d) List is Arbitrary and Capricious, since Respondents Have not Identified a "Pollutant" Supposedly Impairing the Entire Missouri or Mississippi Rivers, and Have not Identified any Evidence Supporting their Finding that the Missouri or Mississippi Rivers Are in fact Impaired by any "Pollutant".

The only "pollutant" Respondents identified as supposedly impairing the Missouri and Mississippi Rivers was "habitat loss," caused by "channelization". Both the Clean Water Act and EPA's governing regulations require the State to identify the "pollutant" causing an alleged impairment for each water included on its 303(d) list. 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7(b)(4) (303(d) lists "shall identify the pollutants causing or expected to cause violations of the applicable water quality standards"). Because "habitat loss" is not such a "pollutant", Respondents violated the law by including the Missouri and Mississippi Rivers on the 1998 303(d) list.

The Clean Water Act defines a "pollutant" as a variety of substances, as well as heat, which are "discharged into water." 33 U.S.C. § 1362(6). "Habitat loss" simply cannot meet this

definition – in the first place, it is not a substance or property; moreover, "habitat loss" is not "discharged into water."

EPA has itself recognized, in the preamble to its final TMDL rule, that "habitat loss" is not a pollutant in the circumstances present here.[5] The discussion begins by explaining the difference between the broad term "pollution", and the narrower term "pollutant" used in § 303(d):

> Pollution, as defined by the CWA and the current regulations is "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of a waterbody." This is a broad term that encompasses many types of changes to a waterbody, including alterations to the character of a waterbody that do not result from the introduction of a specific pollutant * * *. In some cases, the pollution is caused by the presence of a pollutant, and a TMDL is required. In other cases it is caused by activities other than the introduction of a pollutant.

65 Fed. Reg. 43,586, 43,592 col. 1 (July 13, 2000). EPA then specifically states that "habitat loss" *is not an "impairment" caused by a "pollutant"*:

> Degraded aquatic habitat is evidence of impairment which may be caused solely by channelization of a stream's bottom. *In this case the waterbody would be considered impaired by pollution that is not the result of the introduction or presence of a pollutant*.

Id. (emphasis added).[6]

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[5] EPA has delayed the rule's effectiveness to permit the agency "voluntarily to reconsider" it, due to the "considerable controversy" it engendered. 66 Fed. Reg. 53,044 col. 3 (Oct. 18, 2001).

Similarly, EPA's National Guidance document recognizes that other impairments which affect the physical profile of a water body do not constitute impairment by a "pollutant":

> In the specific case of a physical barrier to fish migration such as a culvert, [ ] there is no pollutant to allocate and the TMDL process is not appropriate.

AR 1323. Under this reasoning, "habitat loss" does not justify 303(d) listing, since "there is no pollutant to allocate" among dischargers to the waterbody.

Because they failed to identify any "pollutant" impairing the quality of the Missouri or Mississippi Rivers, Respondents violated the law in including these great Rivers on their 1998 303(d) list, and the listing of those waters must be declared invalid.

Besides their failure to follow the law, Respondents' listing of the Missouri and Mississippi Rivers is also arbitrary and capricious because Respondents failed to identify *any* evidence in the Administrative Record supporting their listing decision. The *only* technical assessment of the water quality of these rivers in the record is the Missouri Department of Natural Resources' determination that "there are no water quality contaminant violations." L.F. 192-193. Obviously, in the absence of *any record support*, Respondents' finding that these rivers are impaired by a "pollutant" must be vacated as arbitrary and capricious.

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[6] This passage continues by stating that habitat degradation may be the result of impairment by a "pollutant" "if the channelization also caused the bottom to become smothered by excessive sediment deposition," 65 Fed. Reg. at 43592 col. 1. But that qualification is inapplicable here, because there is no indication in the Administrative Record that Missouri believed that channelization of the Missouri or Mississippi had caused excessive sedimentation – indeed, the one reference in the record to the water quality of these Rivers is the Missouri Department of Natural Resources' assessment that "there are no water quality contaminant violations." L.F. 192-193.

CONCLUSION

The trial court erred when it dismissed Appellants' cause of action. Because Respondents engaged in rulemaking when they enacted Missouri's 303(d) list, their actions were reviewable under the MAPA. Even if not a "rule", the 1998 303(d) list is clearly a "determination", subject to review under the Clean Water Act.

On the merits, Respondents' promulgation of the 303(d) list must be declared invalid – it was promulgated in clear violation of the procedural requirements of the MAPA and the Missouri Clean Water Law, it fails to identify a "pollutant" justifying the listing of the Missouri and Mississippi, and Respondents' determination that these waters are impaired has absolutely no evidentiary basis in the Administrative Record.

Therefore, Appellants respectfully request that this Court reverse the trial court's dismissal of Appellants' action, and enter an Order directing that on remand the Circuit Court declare Missouri's 1998 303(d) list invalid and of no further force or effect.

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Dated: May 30, 2002

CERTIFICATE OF SERVICE

The undersigned certifies that the above and foregoing was served, via First-Class, U.S. Mail, postage prepaid, this 30th day of May, 2002, to:

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS AND VIRUS-FREE DISK

The undersigned certifies that in accordance with Mo.R.Civ.P. 84.06(c), the foregoing appellate brief complies with the word count limitation contained in Mo.R.Civ.P. 84.06(b). In particular, Appellants' brief consists of approximately 14,941 words, based upon a word count which generated by WordPerfect 8.1, the word processing program used by Appellants to compile the instant brief. Pursuant to Mo.R.Civ.P. 84.06(g), the disk has been scanned for viruses and is virus free.

An Attorney for Appellants